No. 79-718

In the Supreme Court of the United States

OCTOBER TERM, 1979

LOUIS VIGNOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed by judgment order (Pet. App. B) without opinion. The opinion of the district court is reported at 464 F. Supp. 1091.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1979. A petition for rehearing with a suggestion of rehearing en banc was denied on September 4, 1979. Mr Justice Brennan extended the time for filing a petition for a writ of certiorari to November 2, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution under 18 U.S.C. 1962(c), the jurisdictional requirement of the statute is satisfied by proof that the named enterprise is one engaged in, or the activities of which affect, interstate commerce, regardless of whether the charged acts of racketeering themselves affected interstate commerce.

2. Whether the district court properly admitted hearsay evidence of other improper conduct on the part of petitioner.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conducting the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity in violation of 18 U.S.C. 1962(c). He was sentenced to two years' imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. B).

The evidence at trial is summarized in the opinion of the district court (Pet. App. 3a-4a). Briefly, when petitioner became the Presiding Judge of the Philadelphia Traffic Court in January 1974, he had the authority to appoint and remove writ-servers, who served arrest warrants issued by the traffic court and who received as compensation a fee for each warrant served. Petitioner solicited and accepted numerous payments from two writ-servers, Edwin Lynch and Charles Vare. Between 1974 and 1977, in order to keep his job, Lynch paid petitioner first $600 a month, then $800 a month,

and finally $1100 a month (App. 108a-118a, 120a-126a).[1] Vare made five payments of between $125 and $250 each (App. 591a-592a).

ARGUMENT

1. 18 U.S.C. 1962(c) prohibits any person "employed by or associated with any enterprise engaged in, or the activities of which affect, interstate commerce" from conducting the enterprise's affairs "through a pattern of racketeering activity * * *." "Enterprise" is defined in 18 U.S.C. 1961(4) to include, among other things, "any individual * * * association, *or other legal entity* * * *" (emphasis added). The enterprise in this case was the Philadelphia Traffic Court, and the pattern of racketeering activity was a series of acts of bribery.[2]

Petitioner contends (Pet. 7-11) that the government failed to establish a nexus between his conduct and interstate commerce. As the district court held (Pet. App. 9a), however, Section 1962 requires only that the affairs of the enterprise, not the particular acts of each defendant, affect interstate commerce. The enterprise in this case, the Philadelphia Traffic Court, affects interstate commerce because it imposes fines in connection with vehicles driven across state lines (Pet. App. 9a n.18). It was therefore not necessary to show that petitioner's own conduct affected commerce.

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[1]On one occasion, when Lynch had fallen behind in his payments, petitioner threatened to fire him (App. 118a-119a). "App." refers to the two-volume appendix in the court of appeals.

[2]Under 18 U.S.C. 1961(1)(a) state bribery or extortion offenses punishable by imprisonment for more than one year are acts of racketeering. The acts of bribery involved in this case were violations of Pa. Stat. Ann. tit. 18, § 4701 (Purdon).

Petitioner contends (Pet. 8-9) that Congress lacks the power to penalize racketeering conduct that is not shown in each case to affect interstate commerce directly. This theory was squarely rejected in *United States* v. *Perez*, 402 U.S. 146 (1971), which held that where the class of regulated activity as a whole affects interstate commerce, "the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* at 154, citing *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968).[3]

The cases petitioner relies upon are inapposite. *United States* v. *Bass*, 404 U.S. 336 (1971), held that a statute which proscribes the possession by a convicted felon of a firearm "in commerce or affecting commerce," requires a nexus between the defendant's own conduct and interstate commerce. That decision was based, however, on the language of the statute, which was somewhat ambiguous. By contrast, there is no ambiguity in Section 1962(c); it is clear that Congress intended that the interstate commerce requirement apply to the enterprise and not to the defendant's conduct. *Rewis* v. *United States*, 401 U.S. 808 (1971), concerned the Travel Act, 18 U.S.C. 1952, which prohibits a person from crossing a state line for the purpose of promoting or carrying on certain unlawful activities, including gambling. In holding that the proprietors of a gambling operation did not violate the statute merely because

[3]The use of the phase "engaged in or the activities of which affect, interstate or foreign commerce" in Section 1962 shows that Congress intended to exercise its commerce power to its fullest extent and therefore that only a minimal effect upon commerce need be shown. See *United States* v. *Parness*, 503 F. 2d 430, 439 n.13 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Cf. *Scarborough* v. *United States*, 431 U.S. 563 (1977); *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); *United States* v. *Staszcuk*, 517 F. 2d 53 (7th Cir.), cert. denied, 423 U.S. 837 (1975).

some of their customers travelled across a state line, the Court observed (401 U.S. at 811) that, under its express terms, the Travel Act in pertinent part applies only where the defendant or his agents cross the state line. In contrast, 18 U.S.C. 1962 imposes no such restriction.

2. Government witnesses William Grubb and Barney Cummins testified that, after they had been hired as deputy writ servers by Barry Simmons, a writ server, Simmons told them that he had to pay petitioner $500 each to have them sworn in (App. 653a-654a, 703a). They also testified that Simmons took the money and a box of cigars into petitioner's office (App. 655-659, 703-706). Cummins testified that while sitting outside petitioner's office, just after having seen petitioner in his office, he saw the box of cigars and the envelope of money placed on petitioner's desk and then disappear from view (App. 659). Petitioner contends (Pet. 11-12) that the district court erred in admitting this evidence.

Petitioner's acceptance of the money from Simmons was not among the charges in the indictment. This conduct was nonetheless admissible under Fed. R. Evid. 404(b) to prove petitioner's intent in accepting the payments that were charged, *i.e.*, to show that the payments were not gifts or legitimate payments in the normal course of the business of the Traffic Court. For example, in his cross-examination of Richard Croft, who had delivered envelopes to petitioner for Edwin Lynch, defense counsel brought out the fact that Croft delivered warrants along with the envelope and thus implied that the defendant received the money in the proper course of his business (App. 449a).

To the extent that the testimony in question was hearsay, it was admissible under Fed. R. Evid. 803(3) to show Simmons' reason for making the payments. Since

the witnesses saw Simmons take the money to petitioner's office, their testimony that the money was placed on petitioner's desk was not hearsay. Whether the payment was a bribe depended in part on the state of mind of Simmons and petitioner. Thus, Simmons' own statements as to his state of mind were therefore relevant and admissible. *United States* v. *Davis*, 576 F. 2d 1065, 1067-1068 (3d Cir.) cert. denied, 439 U.S. 836 (1978). Moreover, the evidence directly explains the nature of the enterprise, a fact relevant to the charge. As such, it was properly admitted, as the district court held (Pet. App. 16a). Furthermore, inasmuch as Simmons was hospitalized and unavailable (see Pet. App. 15a), the testimony was admissible hearsay under Rule 804(3) as a declaration against interest because it tended to establish his own criminal liability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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